(10)

No. 05-184

MOTION FILED

JAN 11 2006

IN THE
Supreme Court of the United States

SALIM AHMED HAMDAN,
Petitioner,

v.

DONALD RUMSFELD, ET AL.,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit**

MOTION FOR AN ORDER DIRECTING THE PARTIES TO SUBMIT SUPPLEMENTAL BRIEFING

Petitioner respectfully requests that the Court direct supplemental briefing on the effect, if any, of the Detainee Treatment Act, P.L. 109-148, on the proper disposition of this case. *Cf.* S. Ct. R. 25.5.[1]

Petitioner suggests that the parties submit simultaneous briefs twenty-one days after this Court's Order granting this Motion and simultaneous reply briefs fourteen days later. This schedule will ensure that the briefing is completed prior to oral argument. Given the substantial questions raised by the legislation, petitioner suggests that opening briefs be twenty-five booklet pages in length, with reply briefs limited to ten pages.[2]

1. On December 30, 2005, one week before petitioner's merits brief was due to be filed, President Bush signed a Defense Appropriations Act, a portion of which is now known as the "Detainee Treatment Act." The Act has three principal subsections. Section 1005(e)(1) provides:

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[1] Over recent weeks, petitioner has twice consulted with the Solicitor General seeking to secure agreement on a briefing schedule, but the government - although it has already indicated in district court filings that claims brought by Guantanamo Bay detainees must be dismissed pursuant to the Detainee Treatment Act – has stated that it does not yet know how it intends to proceed in this Court. Because the legislation was passed only days before the submission of petitioner's opening brief, and because discussions between the parties on how to address the effect of the legislation were ongoing, petitioner deferred briefing the question. See Pet. Br. 1.

[2] The Court may also wish to consider allocating additional time for oral argument directed to the effect of the Detainee Treatment Act.

IN GENERAL. Section 2241 of title 28, United States Code, is amended by adding at the end the following:

"(e) Except as provided in section 1005 of the Detainee Treatment Act of 2005, no court, justice, or judge shall have jurisdiction to hear or consider

"(1) an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba; or

"(2) any other action against the United States or its agents relating to any aspect of the detention by the Department of Defense of an alien at Guantanamo Bay, Cuba, who

"(A) is currently in military custody; or

"(B) has been determined by the United States Court of Appeals for the District of Columbia Circuit in accordance with the procedures set forth in section 1005(e) of the Detainee Treatment Act of 2005 to have been properly detained as an enemy combatant."

Subsections (2) and (3) set forth procedures for the review of final decisions of, respectively, the Combatant Status Review Tribunals ("CSRTs") and military commissions, including in both instances limited review by the United States Court of Appeals for the District of Columbia Circuit.

Section 1005(h) provides an effective date and addresses applicability:

EFFECTIVE DATE—

(1) IN GENERAL.—This section shall take effect on the date of the enactment of this Act.

(2) REVIEW OF COMBATANT STATUS TRIBUNAL AND MILITARY COMMISSION DECISIONS.—Paragraphs (2) and (3) of subsection (e) shall apply with respect to any claim whose review is governed by one of such paragraphs and that is pending on or after the date of the enactment of this Act.

2. The position of the government is that the Detainee Treatment Act strips the federal courts of jurisdiction to adjudicate pending claims by Guantanamo Bay detainees. President Bush has issued a statement to that effect, and the government has so argued in the District Court for the District of Columbia. See App. A, B & C, *infra*. On January 4, 2006, Counsel for Respondents filed a motion notifying the United States District Court for the District of Columbia that, pursuant to the Act, they would file motions to dismiss all pending cases regarding Guantanamo detainees, including specifically the Hamdan case. *See* App. A. However, on January 10, 2006, Counsel for Respondents notified the United States District Court for the District of Columbia that the filing in the above paragraph "inadvertently" included the Hamdan case and that "[g]iven that this case is currently pending before the United States Supreme Court, Respondents do not

contemplate filing a motion to dismiss in this case at this time, and hereby withdraw the Notification of Supplemental Authority." *See* App. B.

3. Because the issue presented is a jurisdictional one, even if Respondents decide not to seek dismissal on the basis of the Act, there are at least three aspects that merit thorough briefing and consideration by this Court.

First, whether Congress intended the take the extraordinary step of attempting to strip this Court of its jurisdiction to consider a pending case. Petitioner will argue that it did not. The bill as originally drafted did purport to strip the federal courts of jurisdiction over pending challenges, but that provision was deleted. *Compare* 151 CONG. REC. S12,665-667 (daily ed. Nov. 10, 2005) (Amdt. 2516, § (d)(3)) (initial version of bill, stating that the jurisdiction-stripping provisions over habeas corpus petitions filed by detainees at Guantanamo Bay "shall apply to any application or other action that is pending on or after the date of enactment of this Act.") with 151 CONG. REC. S12753 (Nov. 14, 2005) (removing such language from the bill and applying only the "final decision" provisions of subsections (2) and (3) to "pending" cases). The legislative history moreover demonstrates that the revised bill passed only when members of Congress were provided with assurances that pending cases would not be affected. For example, Senator Levin stated on the floor during the debate that the Amendment was preferable to the earlier version because its new limits on habeas corpus petitions by Guantanamo detainees "would apply only to new habeas cases filed after the date of enactment." 151 CONG. REC. S12,802 (Nov. 15, 2005) (remarks of Senator Levin). Accordingly, the new legislation "preserves comity between the judiciary and legislative branches. It avoids repeating the unfortunate precedent in *Ex parte McCardle* [74 U.S. (7 Wall. 506) (1869)], in which Congress intervened to strip the Supreme Court of jurisdiction over a case which was pending before that Court." *Id.* No Senator, including Senator Graham who was standing next to Senator Levin at the time, rebutted the statements by Senator Levin during the debate.

Second, to the extent any members of Congress did intend to strip this Court of jurisdiction to hear this case, whether such legislation would be unconstitutional, violating, *inter alia*, the Suspension Clause, the Exceptions Clause, Separation of Powers principles, and the Due Process Clause of the Constitution.

Third, whether, in any event, the Court retains the power to grant petitioner the relief he requests pursuant to his pending application for an extraordinary writ, which, among other things, invokes this Court's jurisdiction under Article III of the Constitution. *See In re Hamdan*, No. 05-790 (filed December 19, 2005).

4. Because the enactment of the Detainee Treatment Act raises a question regarding this Court's jurisdiction that deserves this Court's thorough consideration, Petitioner's Motion for an Order directing the parties to submit Supplemental Briefs should be granted.

WHEREFORE, Petitioner's motion should be granted.

Respectfully submitted,

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January 11, 2006